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No. 82-356

In the Supreme Court of the United States

October Term, 1982

ROBERT D. STIGLER,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether petitioner's voluntary statement that "I shouldn't have had the stuff in my house," made after he had been issued a full slate of *Miranda* warnings and had declined to make a statement until he conferred with counsel, and after the cessation of interrogation, was a spontaneous and voluntary utterance, free of coercion?

II.

Whether a search warrant may be issued on an underlying affidavit which asserts that a confidential informant has proven reliable and trustworthy in past dealings with a prosecuting attorney?

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion and judgment of the court below were rendered *per curiam* and are reported at 415 So.2d 686.

PARTIES TO THIS PETITION

All parties to the proceeding in this Court are listed in the caption of the case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has sufficiently identified and set forth the constitutional provisions involved in this cause.

STATEMENT OF THE CASE

The two issues raised in this petition, relating to the nature of a post-arrest inculpatory statement and the sufficiency of an affidavit underlying a search warrant, were resolved on direct appeal to the Mississippi Supreme Court in a manner fully in harmony with applicable decisions of this Court.

At approximately 11:00 a.m. on February 11, 1981, three persons representing law enforcement in Leflore County, Mississippi, acting on information received from a confidential informant, appeared before a Justice Court Judge seeking issuance of a search warrant for the residence owned and occupied by petitioner on the belief that a large amount of marijuana was secreted there. In support of the warrant request, an affidavit, together with an appended sheet setting forth the underlying facts and circumstances establishing probable cause for issuance of the warrant,[1] was prepared by the Leflore County Attorney on the basis of information relayed to him by the affiants, a Bureau of Narcotics state agent and the Leflore County Sheriff.

Based on the affidavit, the accompanying statement of facts and circumstances, and oral testimony taken in the presence of the judge, the search warrant was issued and a lawful search of petitioner's home followed shortly thereafter. When officers entered the residence, petitioner was not at home; thus the search was conducted in his absence

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1. This document is reprinted in petitioner's Statement of the Case at pp. 4-5.

and yielded some 200 pounds of marijuana, found hidden in air conditioning ducts and in a barn on the property adjacent to the house. When petitioner returned home later that day, he discovered a copy of the warrant return and at approximately 11:30 p.m. that night, surrendered himself at the Leflore County Sheriff's Office.

Pursuant to his appearance and arrest, a Sheriff's Deputy began routine processing and paperwork. Accordingly, Deputy Richard Oakes administered the full slate of *Miranda* warnings, after which petitioner signed an official waiver of rights form. He was at that time coherent and appeared to be sober and in full control of his faculties. He stated he did not wish to make a statement and Officer Oakes immediately ceased with any manner of interrogation. However, Oakes, in passing, told petitioner that if he wished to provide names of others involved in drug distribution, his assistance would be noted to the district attorney and/or the judge. *Petitioner replied that he would like to confer with his attorney about such action.* Officer Oakes agreed and in no way pushed the issue further. Some few minutes later, petitioner spontaneously exclaimed that he shouldn't have had the "stuff" at his house. This statement was later admitted into evidence at trial though challenged by the defense as the direct result of coercive interrogation. Later, when petitioner took the stand in his own behalf, he denied ever having made the statement. The petitioner was indicted for the offense of possession of more than one kilogram of marijuana. He was tried and convicted in the Circuit Court of Leflore County, Mississippi, and sentenced to serve a mandatory term of three years in the Mississippi State Penitentiary without pardon or parole and to pay a fine of Ten Thousand Dollars ($10,000). The conviction and sentence were affirmed *per curiam* by the Mississippi Supreme Court on May 19, 1982, and petition for rehearing was denied on June 30, 1982.

REASONS FOR DENYING THE WRIT

The parties to this cause are in agreement on several points integral to the analysis of the affidavit underlying the search warrant which eventually produced the contraband for which petitioner stands convicted. It is undisputed that this Court's ruling in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) embodies the standard by which the present affidavit must be gauged. The two-pronged test of *Aguilar* established constituted guidelines for measuring hearsay information in a probable cause setting, either as a predicate for a warrant or for acting, under appropriate circumstances, without a warrant. *Aguilar* was concerned with the trustworthiness of hearsay. The bipartite test articulated therein includes: [1] A "Basis of Knowledge" Prong and [2] a "Veracity" Prong. The latter may be neatly bisected into: [a] A "Credibility" Spur and [b] a "Reliability" Spur. *Aguilar* requires that both the "basis of knowledge" prong and the "veracity" prong be satisfied.

The "basis of knowledge" prong requires of him who would act upon hearsay, a knowledge of some of the underlying circumstances upon which the informant based his conclusion. The "veracity" prong, on the other hand, appears in the alternative and requires of him who would act upon hearsay, a knowledge of some of the underlying circumstances which leads to the conclusion that the informant is (1) "credible or (2) his information reliable."

Petitioner concedes that the first test of *Aguilar*—the "basis of knowledge" test—is satisfied by the present affidavit. It is rather on the second test—the reliability of the informant's information or his credibility—that the parties' interpretation of the facts and law diverges

and conflicts. It is the position of the state that the affidavit here in issue comports which the specificity required by *Aguilar* and its progeny and in no way offends constitutional guidelines.

Expressly, *Aguilar* requires that the magistrate examining an affidavit be shown therefrom ". . . *some* of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" (378 U.S. at 114) Thus, this "veracity" prong apparent in *Aguilar* in precise terms has two disjunctive spurs, seeking either (a) the inherent "credibility" of the source himself or (b) some other circumstances reasonably assuring the "reliability" of the information on the particular occasion of its being furnished.

[a] "Credibility" Spur

While cases following *Aguilar* have interpreted this portion of the test to be most commonly satisfied by averments that "an informer is credible if he has provided truthful tips in the past," *Strode v. State*, 231 So.2d 779 (Miss. 1970), proof of credibility is of course by no means limited to that fact. All informants are employed for "a first time" and on their initial use, which forms the basis for later inherent credibility, they may be deemed credible by other means. A portion of the present affidavit states that the confidential informant was believed by the affiants to be credible based on

> ". . . the information he provided to us on this date and because some of such information is corroborated by other independent sources, who have also provided us reliable information in the past which proved to be correct, ..."

This assertion of previous reliability of the sources corroborating the informant's statements may be deemed func-

tionally equivalent to assertion of the informant's past credibility. Additionally, a later quote from that same document sets forth another basis of establishment of the informant's credibility. Specifically, the statement in support of the affidavit avers that

> This confidential informant has personally been known by the Assistant District Attorney of the Fourth Judicial District of Mississippi for the past ten (10) years, and in his opinion the confidential informant is reliable and trustworthy and has proven to be reliable and trustworthy in his dealings with the Assistant District Attorney over the past 10 years.

Petitioner argues that the unnamed assistant attorney vouching for the credibility of the informant does not suffice in the absence of a voucher by the two officers whose names appear as affiants. This is an obviously erroneous conclusion since courts have held that an affidavit which asserts reliability by reference to a third party who verifies the informant's truthfulness, need not identify that source, especially where it embodies a source involved in law enforcement. In *United States v. Jeffers*, 621 F.2d 221 (5th Cir. 1980), it is stated as follows:

> Jeffers argues that the second prong of the test was not met by the affidavit because it failed to state that the affiant had prior personal dealings with the informant or to include the identity of the IRS agent who vouched for the informant's credibility. "No averment by the police officer explicitly endorsing the informant's reliability is required, however." United States v. Weinrich, 586 F.2d 481, 490 (5th Cir. 1978), cert. denied, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979). It is sufficient that the affiant received his information regarding the informant's reliability from the IRS. See United States v. Williams,

603 F.2d 1168 (5th Cir. 1979); Smith v. United States, 358 F.2d 833, 834 (D.C. Cir. 1966), cert. denied, 386 U.S. 1008, 87 S.Ct. 1350, 18 L.Ed.2d 448 (1967). 621 F.2d at 226-227.

Certainly the affiants had just cause to conclude that an assistant district attorney was credible and they had equal reason to believe his assertions as to the credibility of the informant over a ten year period.

[b] "Reliability" Spur

The "veracity" prong of *Aguilar* is significantly phrased in the disjunctive. Assuming that the magistrate's knowledge of the informant's credibility is "zero", he may alternatively ask, "Was the information furnished under circumstances giving reasonable assurances of trustworthiness?" If so, the information is "reliable," notwithstanding the ignorance as to its source's credibility.

Obviously there is some distinction between an informant's "credibility" and the "reliability" of his information. Informational "reliability", as something separate from it source's credibility, would seem to involve some circumstances assuring trustworthiness on the particular occasion of its being furnished. See: *Ratliff v. State*, 310 So.2d 905, 906 (Miss. 1975).

In the case at bar the informant told the affiants that he physically and personally observed marijuana in petitioner's residence. He went on to describe the packaging of the contraband and to divulge the substance of conversations he had with petitioner concerning the location of the marijuana. Portions of this information were directly corroborated by other persons whose credibility had been established through past dealings with law enforcement personnel. This "independent corroboration" creates additional support of respondent's position based

on this Court's holding in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 2 L.Ed.2d 637 (1969). *Spinelli* devised, or at least enunciated, substitute means for satisfying Aguilarian demands on the issue of veracity. This therapeutic device was identified in *Strode v. State* as follows: ". . . the information may be deemed reliable if corroborated by independent investigation." 231 So.2d at p. 783. When the internal recitation of some of the underlying circumstances which led the officer to conclude that his informant was "credible" or his information "reliable" has not been sufficient to satisfy *Aguilar's* "veracity" prong directly, this buttressing technique—independent investigation—comes into play to determine whether it can "fairly be said that the [informant's] tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration." *Spinelli*, 393 U.S. at p. 415.

Perhaps the affidavit in question could have been more perfectly drawn, but that is not here the issue. All that is required is that it show *some* facts and circumstances from which the magistrate could have found the existence of probable cause.

We respectfully invite this Court to approach the affidavit at bar in the spirit evidenced by the Court's opinion in *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), wherein it was observed that ". . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion." 380 U.S. at p. 108. Reading *Ventresca* further, we find the following:

> "However, where these [underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate

> has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States, supra, 362 U.S. [257], at 270, 80 S.Ct. [725], at 735, [4 L.Ed.2d 697 at 707, 78 A.L.R. 2d 233]." 380 U.S. at p. 109. (emphasis supplied)

In this same vein, the Mississippi Supreme Court in *Meyer v. State*, 309 So.2d 161, 165-66 (Miss. 1973) said:

> We follow the rule that provisions for search and seizures are strictly construed against the state. However, when the circumstances are detailed, the reason for crediting the source of information is given, and the judicial officer has found probable cause, we will interpret the affidavit in a common sense manner. Where the question is close as to probable cause, we will give preference to the warrant. • • •

See also: *Washington v. State*, 382 So.2d 1986 (Miss. 1980); *Joyce v. State*, 327 So.2d 255 (Miss. 1976).

The *Ventresca* mandate, we think, invites reviewing courts to read possibly ambiguous language with an eye toward validating a warrant rather than striking it down. Construed in that manner, the present affidavit presents no constitutional abridgment and one must conclude that prong II of the *Aguilar* test has been satisfied.

Petitioner's second claim of entitlement to a writ of certiorari is predicated on a post-arrest statement he made to arresting officer Randy Oakes. As indicated earlier in this response, petitioner freely surrendered himself to

authorities. He was quickly given the full panoply of *Miranda* warnings and signed a waiver of rights form. He declined to make a statement and questioning ceased. The precise chronology of the next exchange between Oakes and petitioner reveals that Oakes stated that any assistance via names or information petitioner could supply would be duly noted to the district attorney and/or the judge. At this point, petitioner declined to respond until he had conferred with his attorney. Verbal contact between the two men halted immediately until some very few minutes later when petitioner blurted out that he shouldn't have had the "stuff" at his house. It is this unsolicited statement upon which petitioner now seeks reversal, labelling it a product of impermissible custodial interrogation as defined by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and related cases. We submit that the statement in question was totally uncoerced and irresponsive to any verbal contact between petitioner and Officer Oakes.

Miranda, supra, concisely sought to eradicate those instances "in which a person has indicated his desire to exercise his constitutional right of silence but the police refuse to take 'no' for an answer." *Jennings v. United States*, 391 F.2d 512, 515 (5th Cir. 1968), cert. den. 393 U.S. 868, 89 S.Ct. 154, 21 L.Ed.2d 136 (1968). Certainly, Officer Oakes accepted petitioner's desire to halt the questioning, as indicated by his testimony that he did not ask *any* questions following petitioner's decision to stop. The protections of *Miranda* were in no way violated by a freely tendered confession. It is on this point that *Miranda* is most explicit:

> Volunteered statements *of any kind* are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. 384 U.S. at 478.

More recently, in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 682, 64 L.Ed.2d 297 (1980), this Court refined and rephrased the fundamental *Miranda* consideration of what constitutes impermissible interrogation versus volunteered statements by a suspect. Specifically, the Court stated the following:

> This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted:
>
> > "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc. 9, 36 Ohio Ops.2d 237, 10 A.L.R.3d 974 (emphasis added). 446 U.S. at 300.

The holding in *Rhode Island v. Innis* proceeds to clearly explain that *Miranda* does not come into play until interrogation can be shown to have elicited an incriminating response. It is without dispute that "police cannot be held accountable for the unforseen results of their words or actions" *id.* at 302. Further,

> . . . the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

> . . . It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case. *id.*

The dispositive fact in the present case is that petitioner's statement was not the product of interrogation, but rather an uncoerced utterance. Petitioner was neither drunk or mentally disadvantaged as evidenced by his well thought out decision to speak with an attorney before responding to questioning. Moreover, when given the opportunity to divulge "names or information", he flatly declined. Obviously, he knew he was under no compulsion to speak with police and now bears no resemblance to persons described by this Court in *Rhode Island v. Innis*. Certainly, while petitioner's statement might, in restrospect, appear foolish, it was not forced by police and does not constitute a meritful claim before this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Amy D. Whitten, Special Assistant Attorney General State of Mississippi, have this date mailed a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to the Honorable William Liston, Liston, Crull, and Gibson, 128 North Quitman Avenue, Post Office Box 645, Winona, Mississippi, 38967.

Certified, this the 13th day of December, 1982.

/s/ AMY D. WHITTEN
Special Assistant Attorney General
State of Mississippi